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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER	
HUYNH, PHUONG	

ART UNIT	PAPER NUMBER
2857	

DATE MAILED: 12/15/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/810,944	GLAS ET AL.	
	Examiner	Art Unit	
	Phuong Huynh	2857	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *27 September 2006*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-21* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-21* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 101

1. 35 U.S.C. 101 reads as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 1-21 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. A process is statutory if it requires physical acts to be performed outside the computer independent of and following the steps to be performed by a programmed computer, where those acts involve the manipulation of tangible physical objects and result in the object having a different physical attribute or structure (see MPEP 2106). A claim is limited to a practical application when the method, as claimed, produces a concrete, tangible and useful result; i.e., the method recites a step or act of producing something that is concrete, tangible and useful. Referring to the "Interim Guidelines for Examination of Patent Applications for Patent Subject Matter Eligibility" in determining whether the claim is for a "practical application," the focus is not on whether the steps taken to achieve a particular result are useful, tangible and concrete, but rather that the final result achieved by the claimed invention is "useful, tangible and concrete."

Regarding claim 1, the computer-implemented system as claimed provides neither physical transformation, nor any useful concrete, and tangible results.

Specifically, the computer-implemented system that test-loads a server simply recites "a dynamic load adjustor component that dynamically *adjusts user characteristics* based at least in part on a browser

type, for distribution thereof as a percentage of total requests sent to a server being load tested [claim 1, lines 3-5]."

Accordingly, the "*[adjusted] user characteristics*" or the "distribution thereof as a percentage of total requests [that is] sent to a server being load tested" is not recited as being communicated to the user, displayed, or stored in any tangible form for later use or access.

Claims 2-9 depend from rejected claim 1 and therefore are also rejected.

Similarly, claim 21 produces neither physical transformation, nor any useful concrete, and tangible results.

The machine-implemented system for test loading a server as claimed recites "means for dynamically adjusting user characteristics while loading the server [claim 21, line 3]," or "means for distributing the user characteristics including at least a browser type [claim 21, lines 4 and 5]".

Accordingly, the "[distributed] the user characteristics" or the [adjusted] user characteristics" is not recited as being communicated to the user, displayed, or stored in any tangible form for later use or access.

Regarding claim 10, the machine-implemented system as claimed simply recites "*an execution engine* that generates a scenario that loads the server via a plurality of users, the plurality of users dynamically adjusted based on predetermined weightings of a user profile having weighted characteristics that comprises at least a browser type therein, wherein *the scenario distributes user characteristics as a percentage of total requests.*"

Accordingly, the "generated scenario [that] loads the server or distributes user characteristic as a percentage of total requests" or "the loaded server via a plurality of users" is not recited as being communicated to the user, displayed, or stored in any tangible form for later use or access.

In other words, the machine-implemented system that stresses a server as claimed produces neither physical transformation, nor any useful concrete, and tangible results.

Claims 11-15 depend from rejected claim 10 and therefore are also rejected.

Regarding claim 16, the computer-implemented method as claimed in produces neither physical transformation, nor any useful concrete, and tangible results.

The method as claimed simply recites steps of "assigning weights to user characteristics in a user profile [claim 16, line 3]," "dynamically adjusting the user characteristics based on one or more browser types during the testing of the server [claim 16, lines 4 and 5]," or "distributing the user characteristics as a percentage of total requests sent to the server [claim 16, line 6]."

Accordingly, the "[distributed] user characteristics" or the "adjusted user characteristics" is not recited as being communicated to the user, displayed, or stored in any tangible form for later use or access.

Claims 17-20 depend from rejected claim 16 and therefore are also rejected.

Response to Arguments

2. Applicant's arguments filed on September 27, 2006 have been fully considered but they are not persuasive.

Regarding claim 1 (and similarly independent claims 16 and 21), Applicants argue that:

"a computer-implemented system that test loads a server comprising a dynamic load adjustor component that ***dynamically adjusts user characteristics*** based at least in part on a browser type. This result of dynamically adjusting user characteristics is both concrete and tangible as adjustment of such characteristics would naturally modify the state of the affected computer-implemented system. Also, the functionality of dynamically adjusting user characteristics mitigates the need for an administrator or human entity to perform such adjustment, and thus renders the claimed subject matter useful as well" [see Applicants' Remarks: pg. 6, lines 1-8].

Accordingly, "the functionality of dynamically adjusting user characteristics mitigates the need for an administrator or human entity to perform such adjustment" is not being recited in the claim invention.

In other words, the "adjusted user characteristic" is not recited as being communicated to the user, displayed, or stored in any tangible form for later use or access.

Regarding claim 10, Applicants argue that:

"the fact that the scenario can ***load a server via a plurality of users*** is also concrete and tangible as such loading will modify the state of the server. Again, this result is also useful as the scenario and the loading thereof, help simulate a real-world usage environment for a server to determine how the server will handle a plurality of requests in the typical usage pattern [see Applicants' Remarks: pg. 6, lines 18-22]."

Accordingly, generated scenario [that] loads the server or distributes user characteristic as a percentage of total requests" or "the loaded server via a plurality of users" is not recited as being communicated to the user, displayed, or stored in any tangible form for later use or access or helping simulate real-world usage environment.

Further, Examiner also reminds Applicants that in light of Federal Circuit opinion in *Eolas Techs., Inc. v. Microsoft Corp., 399 F.3d 1325, 1338 (Fed. Cir. 2005),* claims 1, 10, 16, and 21 still are not eligible under 35 U.S.C. §101 for the following reasons:

Regarding claim 6 of US Patent No. 5,838,906, the "*computer program product* for use in a system having at least one client workstation and one network server coupled to said network environment, wherein said network environment is a distributed hypermedia environment [claim 6, lines 1-5]" as claimed recites a "*computer readable program code for causing said client workstation to utilize said browser* **to display**, on said client workstation, at least a portion of a first hypermedia document received over said network from said server, wherein the portion of said first hypermedia document is **displayed** within a first browser-controlled window on said client workstation, wherein said first distributed hypermedia document includes an embed text format ... executable application to *execute on said client workstation* in order to **display** said object and enable interactive processing of said object within a display area created at said first location within the portion of said first distributed hypermedia document being **displayed** in said first browser-controlled window [claim 6, lines 16-39]" (emphasis added).

Accordingly, the computer program produce/code is recited as being communicated to the user, displayed, or stored in any tangible form for later use or access. In other words, the claim at bar in *Eolas* is distinguishable from the instant application because it recited a useful, concrete, and tangible result.

Conclusion

3. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Phuong Huynh whose telephone number is 571-272-2718. The examiner can normally be reached on M-F: 8:30 AM - 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Marc Hoff can be reached on 571-272-2216. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Phuong Huynh
Examiner
Art Unit 2857

PH
November 30, 2006

MARC S. HOFF
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